UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Thomas G. Gray, Plaintiff, v. Trott & Trott, P.C. aka Trott Law, P.C.	Case No.: 1:16-cv-00237-RHB-RSK Hon. Judge Robert Holmes Bell Magistrate Judge Ray Kent

MEMORANDUM IN SUPPORT OF DEFENDANT TROTT LAW, P.C.'s MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant Trott Law, P.C. ("Trott"), through its undersigned counsel, Olson Law Group, for its Memorandum of Law in support of its Motion for Judgment on the Pleadings, states as follows:

I. INTRODUCTION

This case implicates Michigan's foreclosure by advertisement statute and requires this Court to determine, in a case of first impression, whether a statutorily required notice of mortgage foreclosure sale ("Notice of Sale") is a communication made "in connection with the collection of a debt" and, therefore, subject to the Fair Debt Collection Practices Act ("FDCPA"). See, e.g. 15 U.S.C. § 1692c(b). Plaintiff's Complaint improperly attempts to expand the scope of the FDCPA to encompass any communication made by a debt collector, including communications that are not made in connection with the collection of a debt; however, the express language of the FDCPA, binding Sixth Circuit precedent, and instructive FTC commentary hold otherwise.

To state a claim under the FDCPA, Plaintiff must first establish, as a threshold matter, that the communication at issue was made "in connection with the collection of a debt." See *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169 (6th Cir. 2011). Contrary to Plaintiff's suggestion, the Notice of Sale was not an attempt to collect a debt. Rather, the Notice of Sale was posted on the premises and published in the county where the premises were situated as a statutory prerequisite to enforcing a contractual obligation between Trott's client and Plaintiff by non-judicial legal process. Furthermore, the Notice of Sale simply indicated that the provisions of M.C.L. § 600.3204 had been met and included the information required by M.C.L. § 600.3212. The Notice of Sale did not demand payment, indicate a due date for any payment, or invite a response of *any kind*. As such, the Notice of Sale was not made in connection with the collection of a debt and, thus, fails to support Plaintiff's claims under the FDCPA as a matter of law. For all of the reasons set forth below, the Court should grant Trott's motion and dismiss Plaintiff's Complaint with prejudice.

II. THE ALLEGATIONS IN PLAINTIFF'S COMPLAINT

On March 7, 2016, Plaintiff filed a putative class action complaint against Trott. (DE 1). Thereafter, on May 12, 2016, Plaintiff filed his amended class action complaint (DE 11) (hereinafter, "Complaint") alleging that the Notice of Sale that Trott caused to be published and posted pursuant to M.C.L. § 600.3201 *et seq.,* somehow violates U.S.C. 15 U.S.C. §§ 1692c(b), 1692d(4), 1692e and 1692e(6). Complaint at ¶ 56.

Specifically, Plaintiff's Complaint alleges that Trott "placed a Notice of Foreclosure Sale in Cadillac newspapers and Detroit Legal News about Plaintiff's default of a mortgage debt." Complaint at ¶ 25. According to Plaintiff, "[a]ll homeowners who are facing foreclosure by advertisement under MCL § 600.3204 *et seq*. [sic] by Trott must endure the breach of privacy and embarrassment of a debt collector advertising to the world that the Michigan Homeowner is in default of a debt, the amount of the debt owed, their address in big bold letters (Exhibit 1) and that a debt collector is collecting from them." *Id*., at ¶ 26. Plaintiff also alleges that "[c]ontrary to the strict prohibitions of the FDCPA, this same notice as Exhibit 1 and 2 is also placed on the door of every homeowner's home without having to inform the world that the debt is owed and that the homeowner is in default. This approach notifies the homeowner of the information the rest of the world should not have to know." *Id.*, at ¶ 28.

The Notice of Sale attached to the complaint identifies the mortgagor, the original mortgagee, the foreclosing assignee, the date of the mortgage, the amount claimed to be due on the mortgage as of the date of the notice, a description of the mortgaged premises, and the length of the statutory redemption period. *Id.*, at ¶ 27. The Notice of Sale also contains the following language: "THIS FIRM IS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION WILL BE USED FOR THAT PURPOSE. PLEASE CONTACT OUR OFFICE AT THE NUMBER BELOW IF YOU ARE IN ACTIVE MILITARY DUTY." *Id.*, at ¶ 29.

III. STANDARD OF REVIEW

"After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. Proc. 12(c). "Motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) are analyzed under the same standard as motions to dismiss pursuant to Rule 12(b)(6)." *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008). The Court must construe the complaint in the light most favorable to plaintiff, accept all well-pled factual allegations as true, and determine whether the complaint states a plausible claim for relief. *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007); *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

Significantly, the plaintiff must provide the grounds for its entitlement to relief, *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001). Thus, the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. The Court "need not accept as true legal conclusions or unwarranted factual inferences." *Mixon v. State of Ohio,* 193 F.3d 389, 400 (6th Cir.1999). "[L]abels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff falls short if she pleads facts "merely consistent with a defendant's liability" or if the alleged facts do not "permit the court to infer more than the mere possibility of misconduct . . . ." *Iqbal* at 1949, 1950. Where it is clear that no relief could be granted to Plaintiff under any set of facts that could be proven consistent with the allegations, judgment on the pleadings is warranted.

IV. MICHIGAN'S FORECLOSURE BY ADVERTISEMENT STATUTE

Foreclosure sales by advertisement are governed by statute in Michigan. *Senters v. Ottawa Sav. Bank, FSB,* 443 Mich. 45, 50, 503 N.W.2d 639, 641 (1993). "Once the mortgagee elects to foreclose a mortgage by this method, the statute governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of the sale, and redemption." *Id.,* (citing M.C.L. § 600.3201 *et seq*.). Section 600.3204 provides that "a party may foreclose a mortgage by advertisement if all of the following circumstances exist:

> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

M.C.L. § 600.3204(1). "If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage." M.C.L. § 600.3204(3).

Mortgagees seeking to foreclose by advertisement must publish notice of their intent to do so "for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold ... are situated." M.C.L. § 600.3208. They must also post a true copy "in a conspicuous place upon any part of the premises described in the notice" "within fifteen days after the first publication of the notice." *Id.* That notice must include:

(a) The names of the mortgagor, the original mortgagee, and the foreclosing assignee, if any.

(b) The date of the mortgage and the date the mortgage was recorded.

(c) The amount claimed to be due on the mortgage on the date of the notice.

(d) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.

(e) For a mortgage executed on or after January 1, 1965, the length of the redemption period as determined under section 3240.

M.C.L. § 600.3212.

V. LAW AND ARGUMENT

Plaintiff's Complaint improperly attempts to expand the scope of the FDCPA to encompass any communication made by a debt collector, including communications that are not made in connection with the collection of a debt. However, the express language of the FDCPA, binding Sixth Circuit authority and instructive commentary from the Fair Trade Commission ("FTC") holds otherwise and properly so. Simply put, the Notice of Sale does not violate the FDCPA because it was not a communication made "in connection with the collection of a debt" and was not made "to collect or attempt to collect any debt." See U.S.C. 15 U.S.C. §§ 1692c – 1692g; see also *Grden*, 643 F.3d 169 (2011); *Gburek v. Litton Loan Serv. LP*. 614 F.3d 380, 385 (7th Cir. 2010). The Notice of Sale did not demand payment, set forth a due date, or request a response of any kind. Rather, the Notice of Sale was posted and published for the sole purpose of enforcing a contractual obligation between Trott's client and Plaintiff by non-judicial legal process. Accordingly, Plaintiff's FDCPA claims fail as a matter of law.

The express language of the FDCPA limits its scope to communications made in connection with the collection of a debt. Specifically, Section 1692c provides in relevant part that:

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, **in connection with the collection of any debt**, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b) (emphasis added).

Similarly, Section 1692d similarly provides that "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person **in connection with the collection of a debt**." Section 1692e contains the same limitations: "[a] debt may not use any false, deceptive or misleading representation or means **in connection with the collection of any debt**."[1]

It is, likewise, well-settled law that the FDCPA does not extend to *every* communication made by a debt collector. *Grden*, 643 F.3d at 173 (6th Cir. 2011), citing *Gburek*, 614 F.3d at 385)(7th Cir. 2010) (emphasis in original). Communications that do not demand payment do not violate the FDCPA because such communications are not made "in connection" with the collection of a debt. "For a communication to be in connection with a debt, an animating purpose of the communication must be to induce payment by the debtor." *Grden, supra*.

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[1] Plaintiff's claims under 15 U.S.C. §§1692d(4), 1692e and 1692e(6) should be dismissed for the additional reason that Plaintiff has not alleged any improper acts or misconduct separate and apart from the shoe-string allegations underlying Plaintiff's third-party disclosure claim under Section 1692c(b).

Here, the purpose for the Notice of Sale was to satisfy the necessary statutory prerequisites to and notice provisions governing foreclosure of the subject mortgage by advertisement, not to induce Plaintiff to make payments on his defaulted mortgage. The Notice of Sale, on its face, explicitly tracked the provisions of M.C.L. § 600.3212. The Notice of Sale did not demand payment, indicate the due date of any future payments, or invite a response of *any kind*. See, also, *Grden*, 643 F.3d at 173 (holding that letters that do not demand payment, but merely inform the debtor about the current status of the account, do not violate the FDCPA); *Gburek,* 614 F.3d at 384 (letter that was "merely a description of the current status of the debtor's account did not have requisite connection). As such, the Notice of Sale is not the type of communication which falls within the scope of the FDCPA.

Furthermore, Trott's standard disclaimer language—which stated that Trott was "a debt collector attempting to collect a debt"—did not, by itself, transform the informational notice into debt collection activity. Courts have found that a disclaimer identifying the communication as an "attempt to collect a debt[] . . . does not automatically trigger the protections of the FDCPA." *Gburek*, 614 F.3d at 386 n.3. Indeed, "inclusion of [an] FDCPA notice is legally irrelevant to the determination of whether a communication is a debt collection activity" and "does not transform the [communication] into an unlawful demand for payment. *Lewis v. ACB Bus. Servs,. Inc.*, 135 F.3d 389, 399 (6th Cir. 1998); see, also *Maynard v. Cannon*, 401 F.App'x 389 (10th Cir. 2010)(same). Plaintiff's argument to the contrary is without merit.

Because the Notice of Sale was not made to induce Plaintiff to make payments on his defaulted mortgage, the Notice of Sale is not a communication in connection with the collection of a debt and, thus, does not invoke the FDCPA. This interpretation is also confirmed by the relevant part of the FTC's Staff Commentary which is particularly instructive and directly on point. See, *Bridge v. Ocwen Federal Bank, FSB*, 681 F.3d 355 (2012) (finding the FTC's Staff Commentary to be instructive); *Dunham v. Portfolio Recovery Assocs., LLC*, 663 F.3d 997, 1002 (6th Cir. 2011) (finding the FTC's Staff Commentary persuasive in construing the FDCPA). The FTC has specifically opined that the term "communication" extends to oral and written transmission of messages which refer to a debt." However, the term does not include "**a notice that is required by law as a prerequisite to enforcing a contractual obligation between creditor and debtor, by judicial or nonjudicial legal process.**" FTC Staff Commentary, 53 Fed.Reg. 50097–02, 50106 (Dec. 13, 1988)(emphasis added).

The Notice of Sale at issue, here, fails squarely within the subset of informational communications that do not fall within the scope of the FDCPA. Consistent with *Grden* and *Gburek,* the Notice of Sale did not demand payment, indicate the due date of any future payments, or invite a response of any kind. The Notice of Sale was posted and published to satisfy the necessary statutory prerequisites to and notice provisions governing foreclosure of the subject mortgage by advertisement, not induce payment. For all of these reasons, the Notice of Sale was not made "in connection with the collection of any debt" and, thus, Plaintiff's claims should be dismissed.

VI. CONCLUSION

For all of the reasons, the Court should: (1) dismiss Plaintiff's Complaint with prejudice; (2) award Trott its fees and costs; and (3) order such other relief as the Court deems just and necessary.

Respectfully Submitted,

/s/ Charity A. Olson
Charity A. Olson (P68925)
OLSON LAW GROUP
2723 S. State St., Suite 150
Ann Arbor, MI 48104
Tel: (734) 222-5179
Fax: (866) 941-8712
colson@olsonlawpc.com

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CERTIFICATE OF SERVICE

I, Charity A. Olson, hereby certify that on July 11, 2016, a copy of the foregoing document was filed via the Court's ECF system, which will serve notice on all counsel of record.

/s/ Charity A. Olson
Charity A. Olson